Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

THE LAWRENCE PAPER COMPANY,
Petitioner,

v.

GEORGE R. GOMEZ,
Workers Compensation Director of the State of Kansas,
and
THE STATE OF KANSAS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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QUESTION PRESENTED

Whether Congress intended the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 *et seq.*, to preempt state statutes, such as Kan. Stat. Ann. 44-511(a)(2)(E), which calculate workers compensation benefits in part on the basis of discontinued benefits under ERISA plans?

LIST OF PARTIES

The Lawrence Paper Company which has no parent company and no non-wholly owned subsidiaries

George R. Gomez, Workers Compensation Director of the State of Kansas

The State of Kansas

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The September 14, 1994, memorandum decision of the Kansas District Court, Shawnee Country, Eleventh Division, denying Petitioner's motion for summary judgment and granting Respondents' motion for summary judgment, and that court's journal entry of judgment entered on September 26, 1994, are unreported and included as Appendix B. The decision of the Kansas Supreme Court affirming

the district court is reported, ____ Kan. ____, ____ P.2d ____ (1995), and is included as Appendix A.

STATEMENT OF JURISDICTION

This Court's jurisdiction to review the final judgment of the Kansas Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a). The Kansas Supreme Court issued its final decision in this case on June 2, 1995, App. A, and this petition has been filed within ninety days of that date as required by Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

In relevant part, section 514(a) of ERISA provides that ERISA

> "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA] ...." 29 U.S.C. § 1144(a).

The Kansas Workers Compensation Act, Kan. Stat. Ann. 44-501 *et seq.*, defines "additional compensation" for the purposes of calculating an "average weekly wage" under the Act to include:

> "employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans. * * * Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration." Kan. Stat. Ann. 44-511(a)(2)(E).

STATEMENT OF THE CASE

Procedural History

Petitioner, The Lawrence Paper Company (TLPC), filed this action against Respondents, the Kansas Director of Worker's Compensation and the State of Kansas, in the state district court for the District of Shawnee County, Kansas. TLPC sought a declaration that ERISA, 29 U.S.C. § 1001 *et seq.*, preempts Kan. Stat. Ann. 44-511(a)(2)(E) and requested an injunction preventing respondents from enforcing the Kansas statute. TLPC moved for summary judgment and respondents filed a cross-motion for summary judgment. The trial court denied TLPC's motion and granted respondents' motion. App. B. The Kansas Supreme Court affirmed the trial court's ruling. App. A.

Statement of Facts

There are no disputes between the parties regarding the material facts. TLPC is a corporation incorporated under the laws of the State of Kansas with its principal office and place of business located in Lawrence, Kansas. TLPC is a company which produces and distributes various paper products. TLPC furnishes employer-paid health insurance to its employees, as well as contributing to savings, profit-sharing and pension plans for its employees. There is no dispute that TLPC's employee benefit plans are within the scope of ERISA and are not subject to any exemptions from ERISA.[1]

The Kansas Workers' Compensation Act (KWCA) requires that the value of certain discontinued employer-paid benefits be included in the wage base used to calculate workers compensation benefits for injured employees. Specifically, Kansas law defines "wage"

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[1]TLPC is engaged in interstate commerce and its activities and operations affect interstate commerce, *see* 29 U.S.C. § 1003(a), and, as the Kansas Supreme Court expressly recognized, TLPC's plans are not exempt from ERISA under 29 U.S.C. § 1003(b)(3) (exemption for benefit plans maintained solely for the purpose of complying with state workers compensation laws), because TLPC's plans are not maintained solely for purpose of complying with applicable Kansas workers compensation laws. *See* App. A 3.

to include both "money" and "additional compensation" received for services rendered for an employer. Kan. Stat. Ann. 44-511(a)(3). "Additional compensation" is defined to include the value of "employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans" if such benefits are discontinued. Kan. Stat. Ann. 44-511(a)(2)(E). Respondents require employers such as TLPC to recalculate workers compensation benefits paid to injured workers on the basis of § 511(a)(2)(E) whenever the ERISA benefits of an employee receiving workers compensation have been terminated.

Proceedings in the Trial Court

TLPC filed this suit in state district court, seeking a declaration that § 511(a)(2)(E) is preempted by section 514(a) of ERISA, 29 U.S.C. § 1144(a), and an injunction preventing respondents from enforcing the Kansas statute. TLPC moved for summary judgment and respondents filed a cross-motion for summary judgment. The trial court denied TLPC's motion and granted the cross-motion of respondents. *See* App. B 8.

The trial court recognized that ERISA preemption "is broad in scope," App. B 1, but concluded that this Court's decision in *District of Columbia v. The Greater Washington Board of Trade*, 506 U.S. ____, 113 S. Ct. 580 (1992), "more comprehensively embraces the Defendants' position than that of the Plaintiff." App. B 2. In *Greater Washington Board of Trade*, this Court, by an 8-1 vote, held that ERISA preempted a District of Columbia law which required employers who provided ERISA-covered health insurance plans for their employees to provide equivalent health insurance coverage for injured employees eligible for workers compensation benefits. The trial court acknowledged that the Kansas statute does in certain "circumstances requires the recalculation of Workman's Compensation benefits considering a benefit plan covered by ERISA." App. B 2. The court nonetheless rejected TLPC's assertion that ERISA preempts the Kansas statute for two primary reasons. First, the court opined that "the Kansas statute does not materially alter an existing administrative scheme under ERISA." App. B 8. Second, the court concluded that any relationship between the Kansas statute and any ERISA

plan maintained by TLPC was too "remote, tenuous and peripheral" to invoke preemption. *Id.*

The Kansas Supreme Court

The Kansas Supreme Court affirmed. The court observed that "[t]he issue is simply whether the way in which the KWCA, through K.S.A. 44-511(a)(2)(E), defines an employee's compensation for purposes of computing disability benefits is preempted by ERISA§ 514(a), 29 U.S.C. § 1144(a) (1988)." App. A 3. In deciding that issue, the Kansas Supreme Court first opined that this Court's approach to ERISA preemption had evolved over time, from disfavoring such preemption (citing *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504(1981)), to an expansive view of ERISA preemption (citing *District of Columbia v. The Greater Washington Board of Trade*, 506 U.S. ____, 113 S. Ct. 580 (1992)), to perhaps a narrower approach most recently (citing *New York Conference of Blue Cross v. Travelers Ins.*, ____ U.S. ____, 115 S. Ct. 1671 (1995)). App. A 8.

The court rejected TLPC's contention that *Greater Washington Board of Trade*, in which this Court held that ERISA preempted a District of Columbia law which required employers who provided ERISA-covered health insurance plans for their employees to provide equivalent health insurance coverage for injured employees eligible for workers compensation benefits, controlled the outcome of this case. Although the court candidly acknowledged that Justice Stevens' statement of the issue in *Greater Washington Board of Trade* seems equally applicable to the Kansas Statute,[2] App. A 10, the court attached no significance to that fact, pointing out that Justice Stevens' was the lone dissenter in *Greater Washington Board of Trade*. App. A 10.

The Kansas Supreme Court also rejected TLPC's contention that, because the benefit levels of the KWCA under Kan. Stat. Ann.

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[2]Justice Stevens framed the issue in *Greater Washington Board of Trade* as follows: "The basic question that this case presents is whether Congress intended to prevent a State from computing workmen's compensation benefits on the basis of the entire remuneration of injured employees when a portion of that remuneration is provided by an employee benefit plan." 113 S. Ct. at 585.

44-511(a)(2)(E) are tied directly to the value of ERISA-covered plans, *Greater Washington Board of Trade* compelled a finding of preemption in this case. The court acknowledged that "[i]t is true that under K.S.A. 44-511(a)(2)(E) there is a direct correlation between benefits provided to an employee under certain ERISA-covered benefit plans and the amount of disability benefits the employee may be eligible to receive under the KWCA." App. A 10. The court, however, distinguished the Kansas statute from the District of Columbia law at issue in *Greater Washington Board of Trade* on the ground that the Kansas law "imposes no mandate for the continuation of ERISA benefits (or their equivalent) to injured employees." App. A. 11.

After briefly surveying four recent federal court of appeals decisions in which the courts declined to find ERISA preemption of state laws concerning garnishment, prevailing wages, and a requirement that an employer maintain a workers compensation plan, *see Guidry v. Sheet Metal Workers Nat. Pension Fund*, 39 F.3d 1078 (10th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1691 (1995) (Colorado garnishment law); *Keystone Chapter, Assoc. Builders v. Foley*, 37 F.3d 945 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1393 (1995) (Pennsylvania prevailing wage law); *Minnesota Chapter of Assoc. Builders v. Dept. of Labor*, 47 F.3d 975 (8th Cir. 1995) (Minnesota prevailing wage law); *Combined Management v. Superintendent of Bureau of Ins.*, 22 F.3d 1 (1st Cir.), *cert. denied*, 115 S. Ct. 350 (1994) (Maine law requiring employers to maintain a workers compensation plan administered separately from any multi-benefit ERISA-covered plan), the Kansas Supreme Court turned its attention briefly to this Court's recent decision in *New York Conference of Blue Cross v. Travelers Ins.*, ____ U.S. ____, 115 S. Ct. 1671 (1995), which was issued six days after the oral argument in this case. In *New York Conference of Blue Cross*, this Court held the ERISA does not preempt a New York statute requiring hospitals to collect a surcharge from patients covered by commercial insurers, who were fiduciaries of ERISA plans, but not from patients insured by a Blue Cross/Blue Shield plan. Based on its reading of *New York Conference of Blue Cross*, the Kansas Supreme Court concluded that Kan. Stat. Ann. 44-511(a)(2)(E) has only a "tenuous, remote or peripheral" connection to TLPC's ERISA plans, so that the statute does not "relate to" ERISA plans within the meaning of 29 U.S.C. § 1144(a) and, therefore, ERISA does not preempt the Kansas statute. App. A 18.

REASONS FOR GRANTING THE WRIT

I. The Kansas Supreme Court's Decision Is Contrary To This Court's Decision In *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. ____, 113 S. Ct. 580 (1992), And Should Be Summarily Reversed.

A. This Court's Decision in *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. ____, 113 S. Ct. 580 (1992), Requires a Finding of ERISA Preemption In This Case.

1. *The Majority Opinion*

In *District of Columbia v. The Greater Washington Board of Trade*, 506 U.S. ____, 113 S. Ct. 580 (1992), this Court, in an opinion written by Justice Thomas and by a vote of 8 - 1, held that ERISA, specifically § 514(a) (29 U.S.C. § 1144(a)), preempted a District of Columbia statute which required "employers who provide health insurance for their employees to provide equivalent health insurance coverage for injured employees eligible for workers' compensation benefits."[3] 113 S. Ct. at 582. In deciding whether ERISA preempted the District of Columbia law, this Court observed that "[s]ection 514(a) provides that ERISA 'shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan' covered by ERISA." 113 S. Ct. at 582. The Court went on to declare that "ERISA pre-empts any state law that *refers to or has a connection with* covered benefit plans ... 'even if the law is not specifically designed to affect such plans, or the effect is only indirect ....'" *Id.* at

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[3]The precise language of the District of Columbia statute was as follows: "Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this chapter." D. C. Code Ann § 36-307(a-1)(1) Supp. 1992).

583 (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990)) (emphasis added). At the same time, the Court pointed out in a footnote that "[p]re-emption does not occur, however, if the state law has only a 'tenuous, remote, or peripheral' connection with covered plans ...." *Id.* at 583 n. 1 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n. 21 (1983)).

This Court then held that the District of Columbia law "specifically refers to welfare benefit plans regulated by ERISA *and on that basis alone is pre-empted.*" 113 S. Ct. at 583 (emphasis added). The Court explained that "[t]he health insurance coverage that [the District of Columbia law] requires employers to provide for eligible employees is measured by reference to 'the existing health insurance coverage' provided by the employer and 'shall be at the same benefit level.'" *Id.* at 583-84 (quoting D.C. Code Ann § 36-307(a-1)(1) and (3) (Supp. 1992)). Because many of the employers affected by the District of Columbia statute maintained ERISA-regulated plans, this Court declared that "any state law imposing requirements by reference to such covered programs must yield to ERISA."[4] *Id.* at 584. This Court then further observed that "[i]t makes no difference that [the District of Columbia law's] requirements are part of the District's regulation of, and therefore also 'relate to,' ERISA-exempt workers' compensation plans." *Ibid.* This Court rejected the District's attempt to engraft further considerations onto the preemption analysis, holding that the District of Columbia law related to ERISA plans, "and that is the end of the matter." *Id.* at 585.

The Court's decision in *Greater Washington Board of Trade* controls the outcome of this case and requires a finding that ERISA preempts Kan. Stat. Ann. 44-511(a)(2)(E). The Kansas Supreme Court's decision to the contrary is plainly inconsistent with *Greater Washington Board of Trade* and should be summarily reversed. The Kansas statute, like the District of Columbia statute, mandates cer-

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[4]In a footnote, the Court pointed out that "ERISA does not pre-empt [the District of Columbia law] to the extent its requirements are measured only by reference to 'existing health insurance coverage' provided under plans that are exempt from ERISA regulation . . . ." 113 S. Ct. at 584 n. 3.

tain workers compensation benefits by express reference to ERISA-covered plans and, "on that basis alone is pre-empted." 113 S. Ct. at 583. The Kansas statute clearly is a "state law imposing requirements by reference to" ERISA-covered plans and, therefore, "must yield to ERISA." 113 S. Ct. at 584. "It makes no difference" that Kan. Stat. Ann.44-511(a)(2)(E) is part of Kansas' regulation of, and also relates to, ERISA exempt plans. 113 S. Ct. at 584.

Even a cursory comparison of the District of Columbia statute at issue in *Greater Washington Board of Trade* and the Kansas statute at issue in this case demonstrates that there is no meaningful basis for distinguishing the statutes and, thus, no justification for directly contrary outcomes with respect to the ERISA preemption question. The Kansas statute requires that "additional compensation" for purposes of calculating an "average weekly wage" under the KWCA includes "employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans" when such benefits are discontinued. *See* Kan. Stat. Ann. 44-511(a)(2)(E). The District of Columbia statute required that "[a]ny employer who proves health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this chapter." D.C. Code Ann § 36-307(a-1)(1) (Supp. 1992).

Indeed, the economic effect of the District of Columbia and Kansas statutes on ERISA-covered plans is identical. Both statutes create financial incentives for employers not to fund, not to provide, or not to expand ERISA-covered employee benefit plans; the statutes may even create incentives for employers to reduce or eliminate such plans. Under either statute, an employer who provides no such benefits is at a financial advantage over an employer who does when injured workers receive workers compensation benefits.

The District of Columbia statute, by requiring employers to provide "equivalent" health insurance coverage, may have created a stronger incentive than the Kansas statute for employers not to fund ERISA-covered employee benefit plans, but the Kansas statute has the same effect. Essentially, under the Kansas statute, employers who provide ERISA-covered benefit plans are required to fund two-thirds

(the workers compensation level) of the value of any ERISA-benefit plans in which an employee participated prior to receiving workers compensation benefits. Thus, the extent of the employer's potential additional liability is different under the District of Columbia and Kansas statutes, but the effect is the same. "By tying the benefit levels of the workers' compensation plan to those provided in an ERISA-covered plan," 113 S. Ct. at 583, the Kansas statute, like the District of Columbia statute, "'could have a serious impact on the administration and content of the ERISA-covered plan.'" *Ibid.* (quoting *The Greater Washington Board of Trade v. District of Columbia*, 948 F.2d 1317, 1325 (D.C. Cir. 1991)).[5]

2. Justice Stevens' Dissent

Justice Stevens was the only Justice to dissent from the Court's decision in *Greater Washington Board of Trade*. Justice Stevens began his dissent with the following statement of the issue:

> The basic question that this case presents is whether Congress intended to prevent a State from computing workmen's compensation benefits on the basis of the entire remuneration of injured employees when a portion of that remuneration is provided by an employee benefit plan. 113 S. Ct. 585 (Stevens, J., dissenting).

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[5]This Court has recognized that ERISA does not preempt every action which has an economic effect on ERISA plans. *See, e.g., Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 833 and n. 8 (1988) (giving as examples suits against ERISA plans for unpaid rent, unpaid attorney's fees, and some tort suits). But, in the words of Chief Judge Posner of the Seventh Circuit, "[t]his is not a banana-peel case." *Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126, 128 (7th Cir. 1992). In other words, this is not a case in which the economic effect on the plans is the result of a generally applicable law that is unrelated to the issues of employee benefits and compensation. The Kansas workers compensation statute deals specifically with the question of benefits and compensation to be paid to qualifying, injured employees, the same types of concerns that are at the core of ERISA.

Justice Stevens' framing of the issue further confirms that this Court's decision in *Greater Washington Board of Trade* mandates a holding that ERISA preempts Kan. Stat. Ann. 44-511(a)(2)(E). The Kansas Supreme Court acknowledged that TLPC "correctly notes that Justice Stevens' statement of the issue in *Washington Board of Trade seems also to target* K.S.A. 44-511(a)(2)(E)." App. A 10 (emphasis added). The court, however, refused to attach any significance to Justice Stevens' statement of the issue, offering only the facile observation that "[h]ad a majority of the Court expressly endorsed Justice Stevens' statement of the issue, then LPC's argument might be more persuasive, but no member of the majority joined any portion of the dissent. We limit our consideration of *Washington Board of Trade* to the majority opinion." *Id.* at App. A 10.

Of course, the converse of the Kansas Supreme Court's observation also is true: no member of the majority in Greater Washington Board of Trade expressly disavowed nor disagreed with Justice Stevens' statement of the issue. Moreover, there was no reason for the majority to disagree with Justice Stevens' statement of the issue. Because the majority disagreed with Justice Stevens regarding the outcome of the case, there was no reason for the majority to take issue with his statement of the question presented. The real question is whether Justice Stevens correctly framed the issue in *Greater Washington Board of Trade*, not whether the majority commented upon his characterization or expressly joined his statement. As the foregoing discussion demonstrates, TLPC believes that Justice Stevens' characterization of the question at issue in *Greater Washington Board of Trade* was accurate. At the least, the Kansas Supreme Court offered no persuasive reason for completely disregarding the potential significance of Justice Stevens' statement of the issue in his dissenting opinion.

B. This Court's Recent Decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___, 115 S. Ct. 1671 (1995), In No Way Alters The Essential Holding Of *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. ___, 113 S. Ct. 580 (1992)

In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, ___ U.S. ___, 115 S. Ct. 1671 (1995), this Court unanimously held that ERISA does not preempt a New York statute regulating certain hospital costs. In particular, the New York statute at issue required hospitals to collect surcharges from patients covered by commercial insurers other than Blue Cross and Blue Shield. The asserted purpose for the statute was to equalize the playing field between the commercial insurers, who sometimes offered cheaper but more restrictive coverage policies, and Blue Cross/Blue Shield which accepted many customers for coverage that the other insurers would not but consequently might charge higher rates. 115 S. Ct. at 1678-79. Thus, the goal of the statute was to make Blue Cross/Blue Shield health insurance plans "more attractive (or less unattractive) as insurance alternatives," *Id.* at 1679, a goal which the Court recognized may have an indirect economic effect on insurance buyers, including ERISA plans. *Ibid.*

In considering the contention that ERISA preempted the New York statute, Justice Souter, writing for the Court, declared that

> In *Shaw [v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983)], we explained that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." The latter alternative, at least, can be ruled out [in the New York case]. The surcharges are imposed upon patients and HMOs, regardless of whether the commercial coverage or membership, respectively, is ultimately secured by an ERISA plan, private purchase, or otherwise, with the consequence that the surcharge statutes cannot be said to make "reference to" ERISA plans in any manner. *Cf. Greater Wash. Bd. of Trade*, 506 U.S. at___, 113 S. Ct., at 583 *(striking down District of Columbia law that "specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is preempted").* 115 S. Ct. at 1677 (internal citations omitted) (emphasis added).

The Court then proceeded to examine the New York statutes

under the "connection with" aspect of the ERISA preemption analysis. In so doing, Justice Souter observed that the Court must "go beyond the unhelpful text and the frustrating difficulty of defining" ERISA's key phrase, the "relate to" provision, "and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." 115 S. Ct. at 1677. Applying that analysis, the Court concluded that the statutes in question were not preempted. *Id.* at 1677-82. Nonetheless, the Court was careful to emphasize that "we do not hold today that ERISA preempts only direct regulation of ERISA plans, *nor could we do that with fidelity to the views expressed in our prior opinions on the matter.*" *Id. at 1683* (emphasis added).

The Kansas Supreme Court in this case misread the Court's analysis in *Blue Cross & Blue Shield Plans*. Ignoring the portion of the Court's opinion which refers to *Greater Washington Board of Trade*, and the importance of the Court's conclusion that the New York statutes did not make "reference to" ERISA plans, the Kansas Supreme Court focused solely on its apparent (but unexpressed) perceptions of the objectives of ERISA. After quoting a single sentence from this Court's opinion regarding the objectives of ERISA[6], the Kansas Supreme Court concluded that Kan. Stat. Ann. 44-511 (a)(2)(E)'s "connection" to ERISA plans is too "tenuous, remote or peripheral," App.A 18, to justify preemption.

The Kansas Supreme Court, however, ignored the distinction this Court recognized in *Greater Washington Board of Trade* and *Blue Cross & Blue Shield Plans* between state laws that "make reference" to ERISA plans (and are therefore preempted) and state laws

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[6]The Kansas Supreme Court relied solely on this Court's statement that "[i]ndeed, to read the pre-emption provision as displacing all state laws affecting costs and charges on the theory that they indirectly relate to ERISA plans that purchase insurance policies or HMO memberships that would cover such services, would effectively read the limiting language in § 514(a) out of the statute, a conclusion that would violate basic principles of statutory interpretation and could not be squared with our prior pronouncement that '[p]reemption does not occur . . . if the state law has only a tenous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability.'" 115 S. Ct. at 1679-80 (quoting *Greater Washington Board of Trade*, 113 S. Ct. at 583 n. 1).

which arguably only have some "connection to" ERISA plans (a situation in which the objectives of ERISA become relevant under *Blue Cross & Blue Shield Plans).* As explained above in Part I.A.1, Kan. Stat. Ann. 44-511(a)(2)(E) "makes reference" to ERISA plans in precisely the same fashion as the District of Columbia statute which the Court held ERISA preempted in *Greater Washington Board of Trade* "on that basis alone." Because there is no meaningful basis for distinguishing this case from *Greater Washington Board of Trade,* and this Court's unanimous opinion in *Blue Cross & Blue Shield Plans* clearly and expressly reaffirms the holding in *Greater Washington Board of Trade,* the latter case remains controlling with respect to the Kansas statute. This Court's decisions dictate the conclusion that ERISA preempts Kan. Stat. Ann. 44-511(a)(2)(E).

The Kansas Supreme Court's decision in this case is directly contrary to the relevant precedent from this Court. For the foregoing reasons, petitioner TLPC respectfully requests that this Court summarily reverse that court's decision and direct the Kansas Supreme Court to enter judgment in TLPC's favor.

II. The Kansas Supreme Court's Decision Addresses An Issue Which Has Generated Confusion In The Lower Federal And State Courts And Which Merits This Court's Attention

The Kansas statute at issue in this case, Kan. Stat. Ann. 44-511(a)(2)(E), is not unique in state workers compensation systems. *See, e.g.,* Ala. Code § 25-5-1(6)(1992)("average weekly earnings" include "fringe benefits," defined as "the employer's portion of health, life, and disability insurance premiums," unless the employer continues to pay such benefits during the employee's period of disability); Maine Rev. Stat. § 39A-102(4)(H)(1994)("average weekly wages, earnings or salary" includes any fringe benefits paid by the employer but which are discontinued during the employee's disability); Mich. Compiled Laws Ann. § 418.371(2)(1993)(same); Tex. Code Ann. § 408.045 (1995 Supp.)("nonpecuniary wages" are not included in average weekly wage if employer continues to provide such during the employee's period of disability). *Cf.* Alaska Stat. § 23.30.265(15)(1990)("gross earnings" includes a percentage of the

total employer contributions to a qualified pension or profit-sharing plan in the two years preceding the injury); Fla. Stat. § 440.02(24)(1993)("wages" includes employer contributions to employee health insurance plans). Indeed, as the Kansas Supreme Court observed in this case, "Kansas' approach with respect to fringe benefits is shared by many states." App. A 6. Some states, however, in stark contrast to Kansas, expressly exclude employer contributions to employee benefit plans in calculating wages for workers compensation purposes. *See, e.g.,* Mo. Rev. Stat. § 287.250.2(1993 Cum. Supp.)(term "wages" does not include fringe benefits such as retirement, pension, health and welfare, life insurance or "other employee or dependent benefit plan furnished by the employer for the benefit of the employee"); Mont. Code Ann. § 39-71-123(2)(1993)(term "wages" does not include employer contributions for group insurance or pension plans). Thus, it is neither impossible nor impractical to design a workers compensation system that does not interfere with the purposes of ERISA. As a practical matter, the resolution of the issue presented in this case is of importance to many states and potentially thousands of employers and employees.

Moreover, there is considerable uncertainty and disagreement in the lower federal and state courts regarding the scope of ERISA preemption with respect to workers compensation schemes in general. A number of federal court of appeals decisions resolve the ERISA preemption question in conflicting ways when considering statutes that are similar in nature and effect to the Kansas statute at issue in this case, although TLPC is unaware of any decisions that address ERISA preemption with respect to the precise type of workers compensation statute at issue in this case.

In *Simas v. Quaker Fabric Corp. of Fall River,* 6F.3d 849 (1st Cir. 1993), for example, the First Circuit held that ERISA preempted a Massachusetts "tin parachute" law, which provided "for substantial severance payments to employees who lose their jobs within specified periods before or after a corporate takeover." *Id.* at 851. The Massachusetts statute, in terms of its purpose and effect, is not unlike a workers compensation system. Like a workers compensation system, the "tin parachute" law relates to the compensation an employee is to receive following an event that terminates the employee's previous source of income.

The First Circuit held that ERISA preempts the Massachu-

setts statute. In so doing, the Court first observed that "a state law may relate to an employee benefit plan even though it does not conflict with ERISA's own requirements." *Id.* at 852 (citing *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. ___, 113 S. Ct. 580, 583 (1992)). The court opined that "explanation for the broad preemption provision is clear: By preventing states from imposing divergent obligations, ERISA allows each employer to create its own uniform plan, complying only with one set of rules (those of ERISA) and capable of applying uniformly in all jurisdictions where the employer might operate." *Id.* The First Circuit also commented that

> It may also seem ironic that a federal statute enacted in large part to protect workers should invalidate a state measure that has worker protection as one of its primary objectives. But ERISA, like many a reform statute has more than one purpose and more than one beneficiary. The uniformity of regulation gained by employers under ERISA was assuredly part of the legislative balancing of interests and trade-offs. *Id.* at 856.

Finally, the court concluded that "[c]ourts, who are the least representative branch of government, are the wrong place to restrike the balance." *Id.*

Taking a contrary view are decisions, such as *Keystone Chapter, Assoc. Builders v. Foley*, 37 F. 3d 945 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1393 (1995). In *Keystone*, the Third Circuit held that ERISA does not preempt a Pennsylvania prevailing wage law which calculates the prevailing wage by expressly including ERISA plan benefits. *See, e.g.* Penn. Stat. Ann. 43-260 2a (1992) ("wages" includes "fringe benefits" which include "all monetary employer payments to provide benefits under any employee benefit plan, as defined in section 3(3) of the Employee Retirement Income Security Act of 1974"). The Third Circuit distinguished *Greater Washington Board of Trade as follows:* "While the Supreme Court has held a statute's reference to ERISA plans grounds for preemption, [*citing Greater Washington Board of Trade*]...that statute referred only to the ERISA plan as the basis for the rights it accorded. But the listing of an

ERISA plan as an *example* of the factors to be calculated into a broader determination, such as a prevailing wage, is in and of itself, inconsequential." 37 F. 3d at 957 n. 17. *See also Guidry v. Sheet Metal Workers Nat. Pension Fund*, 39 F. 3d 1078 (10th Cir. 1994)(en banc), *cert denied*, 115 S. Ct. 1691 (1995)(holding that ERISA does not preempt Colorado garnishment law exempting seventy-five percent of "disposable earnings" from garnishment where "earnings" is defined to include compensation in the form of pension, retirement, health, accident, and disability benefits); *Minnesota Chapter of Assoc. Builders v. Dept. of Labor*, 47 F. 3d 975 (8th Cir. 1995)(holding to the same effect as *Keystone* with regard to a Minnesota prevailing wage law).

Simas, *Keystone*, and the other cited decisions all were rendered after this Court's decision in *Greater Washington Board of Trade*, and they demonstrate continuing confusion and difficulty on the part of the lower federal courts in ascertaining the scope of ERISA preemption in employee compensation matters such as workers compensation, severance payments, garnishment and prevailing wage laws.

For the foregoing reasons, TLPC respectfully requests that this Court grant this petition for a writ of certiorari and engage in plenary review of the important and unresolved issue the petition raises. Alternatively, TLPC respectfully suggests that, given the interests of the United States in the proper administration and application of ERISA, this Court could request the views of the Solicitor General regarding the preemptive scope of ERISA with respect to state workers compensation systems.

CONCLUSION

For the foregoing reasons, petitioner The Lawrence Paper Company respectfully requests that this Court summarily reverse the decision of the Kansas Supreme Court in this case or, alternatively, grant this petition for a writ of certiorari and set this case for plenary review.

Respectfully submitted,

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July 28 1995

APPENDIX

IN THE SUPREME COURT OF THE STATE OF KANSAS

THE LAWRENCE PAPER COMPANY, a corporation, *Appellant,*	)	
v.	)	No. 72,751
GEORGE R. GOMEZ, Workers Compensation Director of the State of Kansas and THE STATE OF KANSAS *Appellees.*	)	

SYLLABUS BY THE COURT

1.

K.S.A. 44-511(a)(2)(E) of the Kansas Workers Compensation Act, K.S.A. 44-501 *et seq.*, is not preempted by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* (1988).

2.

K.S.A. 44-511(a)(2)(E) has only a tenuous, remote, or peripheral connection with the covered ERISA plans and does not "relate to" such plans within the meaning of ERISA § 514(a), 29 U.S.C. § 1144(a) (1988).

Appeal from Shawnee district court; MATTHEW J. DOWD, judge. Opinion filed June 2, 1995. Affirmed.

J.D. Lysaught, of Mustain, Higgins, Kolich, Lysaught & Tomasic, Chartered, of Kansas City, argued the case and was on the briefs for appellant.

C. Michael Lennen, of Morris, Laing, Evans, Brock & Kennedy, Chartered, of Wichita, argued the cause, and *A. J.*

Kotich, of Kansas Department of Human Resources, was with him on the brief for appellee.

The opinion of the court was delivered by

SIX, J.: This is a federal preemption case. The Lawrence Paper Company (LPC) seeks a judgment under K.S.A. 60-1701 *et seq.* declaring that a provision of the Kansas Workers Compensation Act (KWCA), K.S.A. 44-501 *et seq.*, is preempted by the federal Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* (1988).

K.S.A. 44-0511(a)(2)(E), the Kansas provision in question, requires that the value of discontinued employer-paid insurance and employer contributions to pension and profit-sharing plans be factored into the computation of disability benefits for injured employees.

The district court held for the defendants George R. Gomez, Workers Compensation Director, and the State, reasoning that ERISA does not preempt K.S.A. 44-511(a)(2)(E). The district courts' conclusion rested primarily on the following determinations:

> "1. The challenged provision of the KWCA does not materially alter an existing administrative scheme under ERISA, nor does it affect the primary function of plaintiff's benefit plans."
>
> "2. Any relationship between the challenged provision of the KWCA and any ERISA-covered plan maintained by plaintiff is at most remote, tenuous and peripheral and does not invoke the preemptive or supersedure provisions of 29 U.S.C. § 1144."

The issue is simply whether the way in which the KWCA, through K.S.A. 44-511(a)(2)(E), defines an employee's compensation for purposes of computing disability benefits is preempted by ERISA § 514(a), 29 U.S.C. § 1144 (a) (1988). LPC seeks to prevent the State from adding the value of discontinued employer-paid insurance, pension, and profit-sharing benefits into the calculation of workers compensation benefits, which are based on an employee's compensation at the time of injury.

Our jurisdiction is under K.S.A. 60-1709 (declaratory judgments) and K.S.A. 20-3017 (transfer from the Court of Appeals). We hold that the provisions of K.S.A. 44-511(a)(2)(E) do not "relate to" LPC's employee benefit plans within the meaning of ERISA's preemption provision, § 514(a), 29 U.S.C. § 1144(a), and consequently are not subject to preemption. We affirm the district court.

The preemption issue is one of statutory construction. Our standard of review is unlimited. *See Gillespie v. Seymour,* 250 Kan. 123, 129, 823 P.2d 782 (1991).

FACTS

The material facts are not in dispute. LPC is a Kansas corporation that engages in interstate commerce. It is neither a religious nor a governmental entity. LPC maintains a health insurance plan, a 401(k) savings and profit-sharing plan, and a pension plan for its employees who choose to participate. The employee benefit plans are within the scope of ERISA, and none of the above-described plans are maintained for purposes of complying with the KWCA. Contributions to the plans are made on behalf of and for the benefit of eligible employees.

LPC is a self-insurer under K.S.A. 44-532. It maintains self-insured status solely for purposes of complying with the KWCA.

DISCUSSION

ERISA preemption is a question of federal law. Decisions of the United States Supreme Court, to the extent they are applicable, control. *Ritchie v. Johnson,* 158 Kan. 103, 117, 144 P.2d 925 (1944). If there is no controlling Supreme Court opinion, the weight of authority in the lower federal courts is considered persuasive. 158 Kan. at 118.

K.S.A. 44-511(a)(2)(E) and the KWCA

Under the KWCA, an injured employee ordinarily is entitled to receive benefits based upon a percentage of the employee's "average weekly wage." For permanent and total disabilities and scheduled injuries, compensation ordinarily is paid at 66-2/3 percent of an employee's average gross weekly wage. This compensation level is limited by statutorily established maximum levels of weekly compensation, by limits on total benefits paid, and by limits on the number of weeks for which benefits may be paid. K.S.A. 44-510c and K.S.A. 44-510d. The value of discontinued employer-paid life insurance, health and accident insurance, and employer contributions to pension and profit-sharing plans is encompassed in the "average weekly wage" calculation. K.S.A. 44-511(a)(2)(E) and (b). The term "wage" means the salary or hourly pay, plus "additional compensation." K.S.A. 44-511(a)(3). "Additional compensation" includes, among other things, gratuities, cash bonuses, employer-provided room and board, and also the following:

> *"employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans....*Additional compensation shall not include the value of such remuneration until and unless such remuneration

> is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration." (Emphasis added.) K.S.A. 44-511(a)(2)(E).

The limitation that fringe benefits are added into the average weekly wage only if such benefits are discontinued is supported by logic and common sense. The limitation prevents double recovery by an injured employee whose employer continues to provide fringe benefits during the employee's period of disability. *See Maxwell v. City of Topeka,* 5 Kan. App. 2d 5, 10, 611 P.2d 161, *rev. denied* 228 Kan. 807 (1980)(noting that "the logical reason for the [K.S.A. 44-511(a)(2)(E)] provisos appears to have been a legislative attempt to add fringe benefits into a claimant's average weekly wage only when such benefits have, in fact, been cut off from the claimant").

The KWCA imposes few specific restrictions on how employers must carry out their statutory obligation to pay the required benefits. Generally, workers compensation payments must be made "at the same time, place and in the same manner as the wages of the worker were payable at the time of the accident," subject to certain exceptions. K.S.A. 44-512. In addition, every employer must maintain adequate workers compensation insurance, qualify as a self-insurer, or belong to a qualified group-funded workers compensation pool in order to"secure the payment of compensation" to its injured employees. K.S.A. 44-532.

The KWCA does not mandate which payment-security option an employer must exercise. It does not mandate that employers set up ERISA-covered benefit plans for their employees or control the terms of any such plan should an employer elect to provide one. Employers may provide, refuse to provide, modify, or cancel any ERISA covered benefit plan with-

out violating any provision in the KWCA.

The Kansas Legislature, in K.S.A. 44-511(a)(2)(E), elected to define an employee's compensation broadly to include fringe benefits such as employer-paid insurance, profit-sharing, and pension contributions. The provision challenged by LPC is neither new nor unique. It first appeared in the KWCA in 1974 and remains today in substantially the same form. L. 1974, ch. 203, § 18. Kansas' approach with respect to fringe benefits is shared by many states. See, *e.g.*, Ala. Code § 25-5-57 (1992) ("average weekly earnings" includes "allowances of any character," which includes employer-paid medical and life insurance premiums); Alaska Stat. § 23.30.265(15) (1990)("gross earnings" includes a percentage of the total employer contributions to a qualified pension plan in the two years preceding the injury); Fla. Stat. § 440.02(24) (1993) ("wages" includes employer contributions for health insurance for the employee).

Scope of ERISA

ERISA establishes comprehensive and uniform federal regulations for private employee pension and welfare benefit plans. *Dist. of Col. v. Washington Trade Bd.*, 506 U.S. __, 121 L. Ed. 2d 513, 518, 113 S. Ct. 580 (1992).

> "Subject to certain exemptions, ERISA applies generally to all employee benefit plans sponsored by an employer or employee organization. § 4(a), 29 U.S.C. § 1003(a). Among the plans exempt from ERISA coverage under § 4(b) are those 'maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation laws or unemployment compensation or disability insurance laws.' § 4(b)(3), 29 U.S.C. §

1003(b)(3)." 121 L. Ed. 2d at 518.

LPC maintains employee welfare and pension benefit plans subject to ERISA, and such plans are not exempt under § 4(b)(3), 29 U.S.C. 1003(b)(3)(1988). The record is less clear, however, on the nature of LPC's "plan" for paying workers compensation benefits. LPC's counsel said in response to a question at oral argument that LPC pays workers compensation benefits through its own plan, administered separately from the ERISA-covered plans it offers employees, stating, "[t]heir [LPC] personnel director is over that type of administration." LPC's ERISA-covered health care plan provides support for counsel's response. The plan specifically *excludes* from its coverage any "occupational" injury or illness "for which the individual is entitled to benefits under any workers' compensation law." Furthermore, in response to a request from defendants to admit that "there is no connection between [LPC's] status as a self-insurer under the Workers' Compensation Act and any employee benefit plan," the LPC alleged no direct administrative connection. Rather, LPC asserted only the economic link between an increase in employer-paid ERISA fringe benefits and an increase in potential liability under the KWCA.

ERISA Preemption

The ERISA preemption provision, § 514 (a), 29 U.S.C. § 1144 (a), assures exclusive federal regulation of covered plans. The intention of Congress in passing § 514 (a) was

> "'to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government..., [and to prevent] the po-

> tential for conflict in substantive law...requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.' *Ingersoll-Rand*, 498 U.S., at 142." N.Y. Conference of Blue Cross v. Travelers Ins., ___ U.S. ___, ___ L. Ed. 2d___, 115 S. Ct. 1671, 1677 (1995).

An early ERISA preemption case noted that "[p]reemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons--either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.'" *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522, 68 L. Ed. 2d 402, 101 S. Ct. 1895 (1981)(quoting *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317, 67 L. Ed. 2d 258, 101, S. Ct. 1124 [1981]). A decade after *Alessi*, the Supreme Court seemed to abandon the principle of disfavored federal preemption in ERISA cases, instead emphasizing the broad language of § 514(a), superseding all state laws that "relate to" ERISA plans. *Washington Board of Trade*, 121 L. Ed. 2d at 520. A close reading of *Blue Cross* suggests that the Court has backed away from, or at least tempered, the broad § 514(a) interpretation suggested in *Washington Board of Trade*. See *Blue Cross*, 115 S. Ct. at 1676-80.

Washington Board of Trade

We next address LPC's contention that *Washington Board of Trade* controls the outcome of the instant case. LPC argues that *Washington Board of Trade* raised an "identical question" to the one now before us and answered it in favor of ERISA preemption. We do not agree either that the questions are identical or that *Washington Board of Trade* controls.

Washington Board of Trade preempted the District of

Columbia's workers compensation law which, in 1991, added the following requirement:

> "Any employer who provides health insurance coverage for an employee shall provide health insurance coverage *equivalent to* the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this chapter." D.C. Code Ann. § 36-307(a-1)(1) (1992 Supp.) (Emphasis added).

The Greater Washington Board of Trade, a nonprofit corporation that provided health insurance coverage for its employees, challenged the "equivalent"-benefits requirement as preempted by ERISA. The United States Supreme Court agreed, holding that the District of Columbia law "specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is pre-empted." *Washington Board of Trade,* 121 L. Ed. 2d at 520. The Court further said that "any state law imposing requirements by reference to such covered programs must yield to ERISA." 121 L. Ed. 2d at 521.

The Court also observed that "[p]re-emption does not occur, however, if the state law has only a 'tenuous, remote, or peripheral' connection with covered plans." 121 L. Ed. 2d at 520 n.1.

Justice Stevens was the lone dissenter. He described the Court's analysis as entering "uncharted territory" and having "open-ended implications." 121 L Ed. 2d. at 524-26 (Stevens, J., dissenting.) Justice Stevens framed what he believed to be the issue as follows:

> "The basic question that this case presents is whether Congress intended to prevent a State from computing workmen's compensation

> benefits on the basis of the entire remuneration of injured employees when a portion of that remuneration is provided by an employee benefit plan." 121 L. Ed. 2d at 522 (Stevens, J., dissenting).

LPC correctly notes that Justice Stevens' statement of the issue in *Washington Board of Trade* seems also to target K.S.A. 44-511(a)(2)(E). LPC argues that the majority's failure to expressly challenge Justice Stevens' statement of the issue establishes its concurrence in his framing of it. Thus, LPC reasons that the outcome of preemption in *Washington Board of Trade* dictates the same result for K.S.A. 44-511(a)(2)(E). Had a majority of the Court expressly endorsed Justice Stevens' statement of the issue, then LPC's argument might be more persuasive, but no member of the majority joined any portion of the dissent. We limit our consideration of *Washington Board of Trade* to the majority opinion.

LPC next contends that preemption is required under *Washington Board of Trade* because "[t]he benefit levels of the Kansas Workers Compensation Act are tied directly to the monetary value of the ERISA-covered plans furnished by plaintiff." In support, LPC cites a similar statement in *Washington Board of Trade* discussing the Court of Appeals' opinion, which was affirmed. See 121 L. Ed. 2d at 519-20.

It is true that under K.S.A. 44-511(a)(2)(E) there is a direct correlation between benefits provided to an employee under certain ERISA-covered benefit plans and the amount of disability benefits the employee may be eligible to receive under the KWCA. For every dollar that an employee, at the time of injury, receives in K.S.A. 44-511(a)(2)(E) fringe benefits which in many (but not all) cases will be paid through ERISA-covered plans, the employee is eligible to receive two-thirds of a dollar in disability benefits in the event the injured employee's fringe benefits are discontinued. The same correlation exists with re-

spect to wages, gratuities, cash bonuses, employer-provided room and board, and payments in forms other than cash. The more an employee earns prior to a compensable disability, the more the employee is eligible to receive (and the employer liable to pay) in workers compensation.

Significantly, the KWCA imposes no mandate for the continuation of ERISA benefits (or their equivalent) to injured employees. Kansas merely looks to the value of ERISA benefits, if discontinued, as one factor to be included in the definition of "wages" used to compute workers compensation benefit levels--no less, no more. If an employee has been paid a weekly cash wage of $100, but receives no other benefits, the employee's "wage" for the purpose of determining workers compensation payment levels under the KWCA is $100. Similarly, under the KWCA, if an employee has received weekly compensation of $100 composed of $80 cash and discontinued ERISA benefits having a value of $20, the employee's "wage" is again $100. LPC, however, urges that the $20 compensation attributable to discontinued ERISA benefits be ignored.

The connection between ERISA plans and workers compensation benefits is significantly different in K.S.A. 44-511(a)(2)(E) from the connection reviewed in *Washington Board of Trade*. The District of Columbia law required that any employer who provided health insurance coverage for an employee must *continue*, for up to 52 weeks, the "existing health insurance coverage" or its equivalent at the same benefit level that the employee had at the time of injury. 121 L. Ed. 2d at 519. Thus, the District of Columbia law did more than merely attach a dollar value to a fringe benefit and include a percentage of that value in computing workers compensation benefits. The District of Columbia law essentially mandated the continuation of ERISA-covered benefit plans. In practical effect, the law prevented an employer from discontinuing ERISA-covered health insurance coverage for employees receiving workers compensation benefits. 121 L. Ed. 2d at 520.

Several circuits have considered ERISA preemption issues since *Washington Board of Trade. Certiorari* has been denied in each case. The Third Circuit has expressed the following guidelines for determining if a law "relates to" an ERISA plan, either directly or indirectly:

> "'A rule of law relates to an ERISA plan if it is specifically designed to affect employee benefit plans, if it singles out such plans for special treatment, or if the rights or restrictions it creates are predicated on the existence of such a plan...
>
> This does not end our inquiry, however. A state rule of law may be preempted even though it has no such direct nexus with ERISA plans if its effect is to dictate or restrict the choices of ERISA plans with regard to their benefits, structure, reporting and administration, or if allowing states to have such rules would impair the ability of a plan to function simultaneously in a number of states.'" *Keystone Chapter, Assoc Builders v. Foley,* 37 F. 3d 945, 955 (3d Cir. 1994), *cert. denied* 115 S. Ct. 1393 (1995)(quoting *United Wire v. Morristown Mem. Hosp.*, 995 F. 2d1179, 1192-93 [3d Cir.], *cert. denied* 114 S. Ct. 382 [1993]).

In *Guidry v. Sheet Metal Workers Nat. Pension Fund,* 39 F.3d 1078 (10th Cir. 1994)(en banc), *cert. denied* 115 S. Ct. 1691 (1995), the Tenth Circuit examined whether ERISA preempted a Colorado law exempting 75 percent of "disposable earnings" from garnishment, where "earnings" was defined to include

> "compensation paid or payable for per-

> sonal services, whether denominated as wages, salary, commission, bonus, *avails of any pension or retirement benefits, or deferred compensation plan, avails of health, accident, or disability insurance, or otherwise."* Colo. Rev. Stat. § 13-54-104(1)(b)(1987). (Emphasis added.)

Guidry held that despite the law's "generic reference to pension benefits," it was "nonetheless one of general application" that did not come within ERISA's preemptive provision. 39 F.3d at 1086. *Guidry* reasoned that "[t]he Colorado garnishment exemption does not affect the calculation of plan benefits, nor does it otherwise impact the administration of the plan or the relationship among the plan entities." 39 F.3d at 1085.

In *Foley,* 37 F.3d 945, the Third Circuit considered whether ERISA preempted provisions of the Pennsylvania Prevailing Wage Act. The Prevailing Wage Act required public works contractors to pay employees the prevailing minimum wage, which was defined to include both a cash component and a benefits component. 37 F.3d at 950. The benefits component of the prevailing minimum wage was determined by "'[f]ringe benefits' paid or to be paid, including payment whether made directly or indirectly, to the workmen for sick, disability, death, other than Workmen's Compensation, medical, surgical, hospital, vacation, travel expense, retirement and pension benefits." 37 F.3d at 950. *Foley* held that ERISA preemption did not arise simply because "some of the benefits the Secretary is permitted to count in calculating the prevailing wage will come from ERISA plans." 37 F.3d at 957. The court continued: "[W]e do not believe ERISA requires a state to ignore the existence of ERISA benefits when considering overall remuneration to workers." 37 F.3d at 957.

The *Foley* court distinguished the prevailing wage law's "connection" to ERISA plans from the "equivalent" benefits

law preempted in *Washington Board of Trade*. *Foley* explained that whereas the equivalent benefits requirement, and resulting legal right for employees, was "premised on the existence of ERISA plans, " the Pennsylvania prevailing wage law "could be meaningfully applied" even "[i]n the absence of ERISA plans." 37 F.3d at 957. The court explained further:

> "[T]hat statute [in *Washington Board of Trade*] referred only to the ERISA plan as the basis for the rights it accorded. But the listing of an ERISA plan benefit as an *example* of the factors to be calculated into a broader determination, such as a prevailing wage, is in and of itself inconsequential. We have held that '[w]here, as here, a reference to an ERISA plan can be excised without altering the legal effect of a statute in any way, we believe the reference should be regarded as without legal consequences for § 514(a) purposes.'" 37 F.3d at 957 n. 17 (quoting *United Wire*, 995 F.2d at 1192).

Recently, the Eighth Circuit followed the reasoning of the Third Circuit's *Foley* opinion in an ERISA preemption challenge to the Minnesota Prevailing Wage Law. *Minn. Chapter of Assoc. Builders v. Dept. Labor*, 47 F.3d 975, 979-80 (8th Cir, 1995).

Finally, the First Circuit found in *Combined Mgt. v. Superintendent of Bur. of Ins.*, 22 F.3d 1 (1st Cir.), *cert. denied* 115 S. Ct. 350 (1994), that ERISA did not preempt a Maine law requiring employers to maintain a workers compensation plan administered separately from any multi-benefit ERISA-covered plan. Combined Management, Inc., (CMI) challenged the law, asserting a right under ERISA to continue providing workers compensation benefits through its multi-benefit ERISA plan. The First Circuit upheld the state law, reasoning, in part, as follows:

> "Maine's law, while having an economic impact on CMI, does not have an economic impact on the IAEA Plan itself. Clearly, any law that increases a company's cost of doing business can be said to affect that business's ability to provide benefits under its welfare benefit plan. This is not the same, however, as imposing burdens on the welfare benefit plan, itself. The increased cost or administrative burdens imposed by the state law must have some connection to the covered ERISA plan before the preemption analysis can come into play."

The same reasoning applies to K.S.A. 44-511(a)(2)(E).

We do not read *Washington Board of Trade* as requiring preemption merely on the basis that a statute refers to ERISA benefits or plans. Each of the circuit courts in *Guidry, Foley, Minn. Chapter*, and *Combined Mgt.* carefully examined the actual effect of the challenged state law on any ERISA covered plans to decide whether preemption was required.

We agree with (1) the Foley court's suggestion that merely listing ERISA fringe benefits as one factor to be included in a broader calculation is "in and of itself inconsequential" for § 514(a) purposes, and (2) the *Combined Mgt.* court's recognition that ERISA preemption does not arise merely because of a state law that increases a company's cost of doing business in a way that could be alleviated by ERISA preemption.

Blue Cross

Six days after oral argument in the instant case, the United States Supreme Court filed *Blue Cross,* 115 S. Ct. 1671. A unanimous court, speaking through Justice Souter, reversed the trial court, (813 F. Supp. 996 [S.D.N.Y. 1993]), and the Court

of Appeals, (14 F.3d 708, 718 [2d Cir. 1993]), holding that the New York statute in question was not preempted by ERISA.

The Court of Appeals in *Blue Cross*, in affirming the trial court's finding of ERISA preemption, relied on *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 77 L. Ed. 2d 490, 103 S. Ct. 2890 (1983), and *Washington Board of Trade*. The Court of Appeals reasoned that ERISA's preemption clause must be read broadly to reach any state law having a connection with, or reference to, covered benefit plans. See 115 S. Ct. at 1675-76. The Supreme Court disagreed. 115 S. Ct. at 1676.

The New York statute questioned in *Blue Cross* required hospitals to collect surcharges from patients covered by a commercial insurer but not from patients insured by a Blue Cross/Blue Shield plan. Blue Cross/Blue Shield, Medicaid, and HMO patients were billed at the hospital's Diagnoses Related Group (DRG) rate. Patients covered by commercial insurance plans were billed at the DRG rate plus a 13% surcharge to be retained by the hospital. Commercially insured patients were also billed an additional 11% surcharge to be turned over to the State. The Court of Appeals decided that the surcharges were meant to increase the costs of certain insurance and HMO health care and held that this purposeful interference with the choices that ERISA plans make for health care coverage constitutes a "connection with" ERISA plans, triggering preemption. 14 F.3d at 719.

The Supreme Court disagreed, holding that New York's surcharge provisions do not "relate to" employee benefit plans within the meaning of § 514(a) and, thus, are not preempted. *Blue Cross* charts its course into the ERISA preemption seas, observing:

> "[W]e have never assumed lightly that Congress has derogated state regulations, but instead have addressed claims of pre-emption with the starting presumption that Congress does

> not intend to supplant state law. [Citations omitted.] Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, [citation omitted] we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" 115 S. Ct. at 1676.

As to the meaning of the phrases "relate to" and "connection with," *Blue Cross* instructs us to "go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." 115 S. Ct. at 1677. *Blue Cross* observes:

> "Indeed, to read the pre-emption provision as displacing all state laws affecting costs and charges on the theory that they indirectly relate to ERISA plans that purchase insurance policies or HMO memberships that would cover such services, would effectively read the limiting language in § 514(a) out of the statute, a conclusion that would violate basic principles of statutory interpretation and could not be squared with our prior pronouncement that '[p]reemption does not occur...if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability.'" 115 S. Ct. at 1679-80.

CONCLUSION

We hold that the connection between K.S.A.(a)(2)(E) and LPC's ERISA plans is only "tenuous, remote, or peripheral." The provisions of K.S.A. 44-511(a)(2)(E) do not "relate to" the plans within the meaning of ERISA § 514(a). Blue Cross and the recent federal Circuit Court ERISA preemption decisions referenced herein support our conclusion that K.S.A. 44-511(a)(2)(E) of the KWCA is not preempted by § 514(a) of ERISA.

Affirmed.
Abbott, J., not participating.
Miller, C. J. Retired, assigned.

IN THE DISTRICT COURT
OF SHAWNEE COUNTY, KANSAS
ELEVENTH DIVISION

THE LAWRENCE PAPER COMPANY, a corporation, *Plaintiff,*	)
vs.	)No. 93 CV 639
GEORGE R. GOMEZ, Workers' Compensation Director of the State of Kansas, and THE STATE OF KANSAS, *Defendants.*	)

MEMORANDUM OF DECISION

THIS ACTION was filed as a Declaratory Judgment suit seeking determination of the issue regarding preemption by the Federal ERISA law of a statutory provision in the Kansas Workman's Compensation statute. Both parties through counsel have filed Motions for Summary Judgment. The matter has been argued and extensively briefed and the Court is prepared to render a decision herein. The Court adopts the findings of fact presented by the Defendants and indeed there are no substantial disputes between the parties as to the facts before the Court.

The Plaintiff correctly states that the Federal Statutory and Administrative scheme announced by ERISA does preempt any state statutes which attempt to affect employee welfare benefit plans. The cases have stated that this preemption is broad in scope but there are exceptions to the preemption provisions. This Court determines that the cases discussing exceptions to the preemption provisions are controlling and that the Workman's Compensation provision of the Kansas law in question should

be, and is exempt from ERISA preemption. In the Court's judgment the case cited by both parties, District of Columbia vs. Greater Washington Board of Trade, 506 U.S. ___, 121 L.Ed.2d. 513, 522, 113 S. Ct. (1992), more comprehensively embraces the Defendants' position than that of the Plaintiff.

The Kansas statute in question, K.S.A. 44-511(a)(1) defines additional compensation to include:

> "employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans...Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration."

This provision does in certain isolated circumstances require the recalculation of Workman's Compensation benefits considering a benefit plan covered by ERISA. In the Court's judgment this does not preempt the Kansas law, but merely is an isolated incidental and peripheral reference to an ERISA plan. The Court also believes that the distinction made between plans and benefits by the Defendants is a good and viable distinction and that where the State law does not affect a benefit plan, it is not preempted. And this is the case in Kansas as well as other states where this issue has been explored.

ERISA defines employee benefit plan as "any plan. . .established or maintained by an employer. . .for the purpose of providing for its participants or their beneficiaries,. . .(A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment. . ." 29 U.S.C. Section 1144(a) (1985).

Employee benefit plans subject to ERISA's provisions include plans established or maintained (1) by any employer engaged in commerce or in any industry or activity affecting commerce. 29 U.S.C. Section 1003(a) (1985). Plaintiff is an employer engaged in commerce or in any industry or activity affecting commerce.

ERISA preempts state laws if they relate to any employee benefit plan established or maintained by an employer engaged in commerce or in any industry or activity affecting commerce. 29 U.S.C. Section 1144(a) (1985).

In *Shaw v. Delta Airlines, Inc.*, the U.S. Supreme Court first determined the scope of ERISA preemption. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890, 77 L.Ed.2d 490 (1983). The issue was whether ERISA preempted New York laws prohibiting discrimination in employee benefit plans. *Id.* at 88. The state law required employers to pay sick-leave benefits to pregnant employees. *Id.* The Court ruled that the New York laws at issue "related to" employee benefit plans. *Id.* at 96. A law "relates to" an employee benefit plan in the normal sense of the phrase, if it has a connection with or reference to such a plan. *Id.* at 96-97. The Court held that if a state law "relates to" an employee benefit plan, ERISA preempts it even if the state law does not involve subject matters explicitly covered by ERISA. *Id.* at 100.

In *Metropolitan Life Ins. Co. v. Massachusetts*, the issue was whether ERISA preempted a Massachusetts statute requiring that Massachusetts residents receive mental health-care benefits. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 105 S. Ct. 2380, 85 L.Ed.2d 728 (1985). Massachusetts argued that its benefit law, as applied to insurance companies that sell insurance to benefit plans, was a law which regulated insurance, not health, and that ERISA's saving clause 1144(b)(2)(A), saved the law from ERISA's preemption clause. *Id.* at 733.

Section 1144(b)(2)(A) states that "[e]xcept as provided

in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." Subparagraph (B) states that:

> Neither an employee benefit plan described in section 1003 (a) of this title, which is not exempt under section 1003 (b) of this title. . .shall be deemed to be an insurance company or other insurer. . .or to be engaged in the business or insurance. . .for purposes of any law of any State purporting to regulate insurance companies. . .Section 1144(b)(B).

The *Metro Life* court ruled that the Massachusetts law related to benefit plans and therefore, was preempted by ERISA. *Id.* at 735. However, the Court stated that Section 1144 substantially qualified ERISA's preemption power with regard to insurance laws which regulate insurance. *Id.* To determine whether the benefit law was a law regulating insurance, the Court used a three-pronged test. *Id.* 743. First, whether the practice had the effect of transferring or spreading a policyholder's risk. Second, whether the practice was an integral part of the policy relationship between the insurer and the insured. Third, whether the practice was limited to entities within the insurance industry. *Id.* The Court determined that the Massachusetts law met these criteria holding that "if a state law regulates insurance . . .it is not preempted" by ERISA. *Id.* at 746.

In *Fort Halifax Packing Co. v. Coyne*, the issue was whether ERISA preempted a Maine statute requiring employers to make a one-time, lump sum severance payment to terminated employees. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 14 L.Ed.2d 1, 107 S. Ct. 2211 (1987). No employer-created severance benefit plan existed at the time the state enacted the statute. 482 U.S. at 6. The severance payment requirement

was driven entirely by the operation of the statute, not by an employer-created benefit plan. *Id.* No administrative scheme whatsoever was required to implement the one-time lump-sum payment. *Id.* Only in the event of termination would the employer's obligation to pay arise. *Id.* at 8. The statute required the employer to assume neither responsibility to pay benefits on a regular basis, nor periodic demands on its assets creating a need for financial coordination and control. *Id.* The Court explained the purpose behind ERISA's preemption provision:

> ERISA's preemption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patch-work scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Preemption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.

HR Rep. No. 93-533, p. 12 (1973)

In light of ERISA's purpose, the Court determined that Maine's statute in no way raised the types of concerns that prompted preemption. *Id.* at 11. The statute neither conflicted with nor impeded the employer's adoption or maintenance of a uniform benefit plan. *Id.* The Court defined employee benefit plan as "benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligations." *Id.* at 11. The Court held that ERISA did not preempt the statute because the statute merely related to "employee benefits." The Court reasoned that Congress, in enacting ERISA, did not in-

tend to preempt one-time, lump-sum payments entailing no implementation or regulation of an administrative scheme. . ."[t]o do little more than write a check hardly constitutes the operation of a benefit plan." *Id.* at 7.

In *Angst v. Mack Trucks, Inc.*, plaintiff claimed its employer wrongfully denied him a promised severance package consisting of continuation of certain employee benefits for a period of one year, plus a one-time, lump-sum payment at the time of termination. *Angst v. Mack Trucks, Inc.*, 969 F2d 1530 (1992). The Court ruled that ERISA did not preempt the plaintiff's claim although the claim involved an existing employee benefit plan. *Id.* at 1540-41. The Court determined that the plaintiff's claim did not relate to an ERISA plan because it did not require "the creation of a new administrative scheme, and [the claim] did not materially alter an existing administrative scheme." *Id.* The Court stated that "while ERISA would concededly preempt state legislation which purported to regulate existing employee benefit plans, a terminated employee's claim to continued employment benefits does not implicate ERISA when the continued benefits are administered pursuant to an existing administrative scheme.

In *Jacob v. Smithkline Beecham*, the U.S. District Court ruled, based on *Angst*, ruled that ERISA did not preempt a terminated employee's claim to continued employment benefits. 824 F.Supp. 552, 559 (E. D. Pa. 1993). The *Jacob* court ruled that no ERISA plan was implicated because the continuation of benefits did not require the employer to administer the benefits under a separate administrative scheme. *Id.* The court cited *District of Columbia v. Greater Washington Board of Trade*, decided five months after *Angst*, and acknowledged *Greater Washington's* and *Angst's* contrary holdings. *Id.* at 558, n.12. The *Jacob* court, however, distinguished the facts in its and the *Angst* case from those in *Greater Washington* and declined to deem *Angst* overruled. *Id.* The *Jacob* court stated that "until the Third Circuit says otherwise, this Court will continue to

adhere to *Angst* in the absence of a Supreme Court holding that does not unquestionably overrule it." *Id.*

In *Gray v. Quaker Fabric Corp.*, plaintiffs filed complaints alleging a right to severance pay under a Massachusetts statute which entitled certain terminated employees to a lump-sum severance payment. *Gray v. Quaker Fabric Corp.*, 809 F.Supp 163 (D.Mass 1992). Like the statute in *Fort Halifax*, this statute required one-time, lump-sum payments in the event of termination. *Id.* However, the statute also required employers to monitor terminations and payments over two and three year periods and establish and maintain procedures for determining employee payment eligibility. *Id.* at 167. The *Gray* court ruled that the Massachusetts statute's effect involved much more than the "unthinking, one-time, nondiscretionary application. . .in *Fort Halifax*. . .and that, as such, the statute was preempted by ERISA. *Id.* 167.

In *Monarch Cement Company v. Lone Star Industries, Inc.*, the issue was whether a claim involving a business-sale agreement related to an employee benefits plan thereby invoking ERISA or whether Kansas State law should apply in deciding breach of contract liability. *Monarch Cement Company v. Lone Star Industries, Inc.*, 982 F.2d 1148 (1982). The Tenth Circuit explained that ERISA preemption is not "triggered [by] just any indirect effect on administrative procedures but rather [by] an effect on the primary administrative functions of benefit plans, such as determing an employee's eligibility for a benefit and the amount of that benefit." *Id.* The Court held that ERISA did not preempt the plaintiff's claim because the claim neither disturbed the administration of a plan, calculation of benefits, determination of entitlement to benefits nor did it "affect the relations among principal ERISA entities, the employer, the plan, the plan fiduciaries, and the beneficiaries as such." *Hospice of Metro Denver, Inc. v. Group Health Ins. of Okla., Inc.*, 944 F.2d 752, 756 (10th Cir. 1991). The Court agreed that "some state actions may affect employee benefit plans in too tenuous,

remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Id.* (citing Shaw. 463 U.S. at 100 n. 21, 103 S.Ct. at 2901 N. 21).

In conclusion the Kansas statute does not materially alter an existing administrating scheme under ERISA. It has no affect on the primary function of Lawrence Paper Company's benefit plan and therefore the Federal ERISA law is not preemptive. The Defendant's Motion for Summary Judgment is granted and the Plaintiff's Motion for Summary Judgment is denied. It is requested that the counsel for the Defendant prepare an appropriate Journal Entry reflecting the Court's findings.

/S/ Matthew J. Dowd
MATTHEW J. DOWD
DISTRICT JUDGE
DIVISION ELEVEN

DATE: 9-14-94

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IN THE DISTRICT COURT
OF SHAWNEE COUNTY, KANSAS

FILED BY CLERK
DISTRICT COURT
3RD JUDICIAL DISTRICT
SEP 26 2 28 PM '94

THE LAWRENCE PAPER COMPANY, a corporation, Plaintiff, v.	)
	)No. 93 CV 639
	)Court No. 11
GEORGE R. GOMEZ, Workers' Compensation Director of the State of Kansas, and THE STATE OF KANSAS, Defendants.	)

JOURNAL ENTRY OF JUDGMENT

NOW on this 2nd day of September, 1994, this matter comes on for hearing on the motion for summary judgment of plaintiff The Lawrence Paper Company and the cross-motion for summary judgment of defendants George R. Gomez, Workers Compensation Director, and the State of Kansas. The plaintiff appears by and through its attorney of record J. D. Lysaught of Mustain, Higgins, Kolich, Lysaught & Tomasic, Chartered, Kansas City, Kansas. Defendants appear by and through their attorneys of record, Michael Lennen of Morris, Laing, Evans, Brock & Kennedy, Chartered, Wichita, Kansas, and A. J. Kotich, Kansas Department of Human Resources, Topeka, Kansas. There are no other appearances.

WHEREUPON, the court having heard the statements of counsel and having reviewed the files herein, and being duly advised in the premises, enters judgment as follows and makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. There are no genuine issues as to any material facts.
2. Plaintiff is a corporation organized and existing under the laws of the State of Kansas and its principal office and place of business is in Lawrence, Douglas County, Kansas.
3. Defendant, George R. Gomez, is the duly appointed, qualified and acting Workers Compensation Director of the State of Kansas, and the State of Kansas has heretofore been joined as a proper party defendant in this action.
4. Plaintiff is engaged and operates in interstate commerce and is an industry and activity affecting interstate commerce. Plaintiff is also operating under and pursuant to the Kansas Workers Compensation Act ("KWCA"), K.S.A. 44-501 *et seq.*, as amended, as a self-insurer and is duly qualified as such.
5. Plaintiff has heretofore furnished employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans to and for the benefit of its employees and such plans are included in the categories enumerated in K.S.A. 44-511(a)(2)(E).
6. Defendant, George R. Gomez, has heretofore required that the monetary value of such benefits be utilized in recomputation of workers compensation when remuneration, as defined in K.S.A. 44-511(a)(2), is discontinued.
7. That the aforesaid employer-paid benefits are welfare benefit plans under the Employee Retirement Income Security Act of 1974 ("ERISA") because they involve a fund or program maintained by the plaintiff for the purpose of providing benefits for plaintiff's employees through the purchase of insurance or otherwise as defined in 29 U.S.C. § 1002(1).
8. Plaintiff's ERISA-covered employee benefit plans are maintained separate and apart from any requirement of the KWCA.
9. Plaintiff is not prevented by the KWCA from terminating any of its ERISA-covered employee benefit plans.

10. Plaintiff is not prevented by the KWCA from amending or modifying terms of any of its ERISA-covered employee benefit plans.

11. The KWCA does not require plaintiff to maintain or establish employee benefit plans for employees receiving workers' compensation benefits equivalent to any of its ERISA-covered employee benefit plans. The KWCA does not require plaintiff to maintain any ERISA-covered employee benefit plans upon termination of an employee receiving workers' compensation benefits.

12. Plaintiff's status as a self-insurer under K.S.A. 44-532 is maintained for the purpose of complying with the KWCA and as an economic alternative to purchase of workers' compensation insurance.

13. The challenged provision of the KWCA affects only the level of workers' compensation benefits awarded injured workers under the KWCA and imposes no legal, regulatory or administrative requirements on any ERISA-covered benefit plan.

CONCLUSIONS OF LAW

1. The challenged provision of the KWCA, K.S.A. 44-511(a)(2)(E), does not materially alter an existing administrative scheme under ERISA, nor does it affect the primary function of plaintiff's benefit plans.

2. Any relationship between the challenged provision of the KWCA and any ERISA-covered plan maintained by plaintiff is at most remote, tenuous and peripheral and does not invoke the preemptive or supersedure provisions of 29 U.S.C. § 1144.

3. The court adopts such other conclusions of law as are set forth in its September 14, 1994, Memorandum of Decision filed herein.

IT IS THEREFORE BY THE COURT ORDERED that plaintiff's Motion for Summary Judgment be, and same is hereby,

denied.

IT IS FURTHER ORDERED BY THE COURT that defendants' Cross Motion for Summary Judgment be, and the same is hereby granted; that judgment be entered against plaintiff denying its petition for declaratory and injunctive relief; and that defendants be awarded costs.

IT IS BY THE COURT SO ORDERED.

/S/ Matthew J. Dowd
THE HONORABLE MATTHEW J. DOWD

APPROVED:

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Supreme Court, U.S.
FILED
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No. 95-180

In The

Supreme Court of the United States

October Term, 1995

THE LAWRENCE PAPER COMPANY,

Petitioner,

v.

GEORGE R. GOMEZ, Workers Compensation Director of the State of Kansas and THE STATE OF KANSAS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether Kan. Stat. Ann. 44-511(a)(2)(E), which provides that the value of discontinued employer-paid insurance and employer contributions to pension and profit-sharing plans should be included with other forms of compensation received by employees in the statutory definition of "wages" used to compute workers compensation benefits, is preempted by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (1988).

LIST OF PARTIES

Petitioner: The Lawrence Paper Company

Respondents: George R. Gomez, Workers Compensation Director for the State of Kansas

The State of Kansas

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No. 95-180

In The

Supreme Court of the United States

October Term, 1995

THE LAWRENCE PAPER COMPANY,

Petitioner,

v.

GEORGE R. GOMEZ, Workers Compensation Director of the State of Kansas and THE STATE OF KANSAS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

BRIEF IN OPPOSITION

The Respondents, George R. Gomez and the State of Kansas, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Kansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Kansas Supreme Court sought to be reviewed by Petitioner is correctly set forth in Petitioner's Appendix A. Petitioner correctly attaches the opinions and describes the procedural history of the case.

STATUTORY PROVISIONS INVOLVED

Federal statutes relevant to this matter are 29 U.S.C. § 1144(a), which states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

and 29 U.S.C. § 1003(b)(3), which provides:

> (b) The provisions of this subchapter shall not apply to any employee benefit plan if –
>
> . . . .
>
> (3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

The Kansas statutes involved are K.S.A. 44-511(a)(2) and (3):

> 44-511. Average gross weekly wage computation; average yearly wage; state's average weekly wage. (a) As used in this section:
>
> . . . .
>
> (2) The term "additional compensation" shall include and mean only the following: . . . and (E) employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans. In no case shall additional compensation include any amounts of employer taxes paid by

the employer under the old-age and survivors insurance system embodied in the federal social security system. Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration.

(3) The term "wage" shall be construed to mean the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment.

STATEMENT OF THE CASE

Under the Kansas Workers Compensation Act ("KWCA"), an injured employee ordinarily is entitled to receive benefits based upon a percentage of the employee's average weekly wage. The value of discontinued employer-paid life insurance, health and accident insurance and employer contributions to pension and profit-sharing plans is encompassed in the average weekly wage calculation. Specifically, the term "wage" is defined to mean an employee's salary or hourly pay, plus "additional compensation." K.S.A. 44-511(a)(3). "Additional compensation", in turn, is defined to include such items as gratuities, cash bonuses, employer-provided room and board and the value of "employer-paid life insurance, health and accident insurance and employer

contributions to pension and profit sharing plans . . . ," if such remuneration is discontinued. K.S.A. 44-511(a)(2)(E).

K.S.A. 44-511(a)(2)(E) was enacted in 1974 and, with the exception of a technical amendment in 1977, has remained unchanged since that time. This statutory provision is directed solely toward determining benefits to be paid injured workers under the KWCA. Neither the challenged statute nor any other provision of the KWCA requires an employer to establish or maintain an ERISA-covered employee benefit plan or its equivalent – regardless of whether an employee is receiving workers compensation benefits. Similarly, the KWCA does not prevent employers from amending, modifying or terminating an ERISA-covered employee benefit plan. The KWCA is completely silent on either the type or amount of an employer's contributions to, or the benefits to be paid by, an ERISA-covered employee benefit plan. Finally, the KWCA does not establish any terms, rules or regulations under which an ERISA-covered employee benefit plan must operate.

Petitioner's workers compensation plan is maintained and administered separately from its ERISA-covered plans. The only link between Petitioner's ERISA-covered benefit plans and its workers compensation plan is economic, in that any increase or decrease in employer-paid ERISA fringe benefits can potentially affect Petitioner's workers compensation liability. The converse relationship, however, does not exist. That is, a change in workers compensation benefit levels has no effect on Petitioner's liability for ERISA-covered fringe benefits.

Petitioner's personnel director who is responsible for administration of Petitioner's workers compensation plan, as well as its ERISA-covered employee benefit plans, testified below he was unaware of a single instance where there had been a recomputation of an employee's wages to take into account the value of discontinued ERISA-plan benefits.

REASONS FOR DENYING THE WRIT OF CERTIORARI

ARGUMENT

A. THE KANSAS SUPREME COURT CONSIDERED AND CORRECTLY APPLIED *GREATER WASHINGTON BOARD OF TRADE* AND *BLUE CROSS*. AS THE CHALLENGED KANSAS LAW DIFFERS MATERIALLY FROM THE DISTRICT OF COLUMBIA LAW AT ISSUE IN *GREATER WASHINGTON BOARD OF TRADE* AND HAS ONLY A "TENUOUS, REMOTE OR PERIPHERAL" RELATIONSHIP TO ERISA PLANS, THIS COURT'S DECISIONS DO NOT WARRANT A FINDING THAT THE KANSAS LAW IS PREEMPTED BY ERISA.

The ERISA preemption provision invoked by Petitioner and applied by the Kansas Supreme Court in this case states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may not or hereafter relate to any employee benefit plan

> described in section 1003(a) or this title and now exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a). Employee benefit plans described in section 1003(a) and subject to ERISA coverage are: employee welfare benefit plans and employee pension benefit plans. 29 U.S.C. § 1002(3).

As this Court observed in *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. ___, 113 S. Ct. 580 (1992):

> Among the plans exempt from ERISA coverage under § 4b are those 'maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation laws or unemployment compensation or disability laws.' § 4(b)(3), 29 U.S.C. § 1003(b).

113 S. Ct. at 582.

The congressional purpose in enacting the preemption provision was:

> 'to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . . [and to prevent] the potential for conflict in substantive law . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.' *Ingersoll-Rand Company v. McClendon*, 498 U.S. at 142 (1990).

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins., 514 U.S. ___, 115 S. Ct. 1671, 1677 (1995).

Respondents acknowledge that ERISA preemption is intended to prevent states and their subdivisions from taking actions that directly or indirectly regulate ERISA-covered employee benefit plans or that have more than a "remote, tenuous or peripheral" connection to covered plans. Respondents also acknowledge that – notwithstanding the ERISA exemption accorded state workers compensation laws – the Kansas law would be subject to preemption if it directly or indirectly regulated or affected ERISA-covered benefit plans or had more than a "remote, tenuous or peripheral" connection to such plans. In this case, however, the challenged provision of the KWCA imposes no legal or regulatory burden on ERISA-covered employee benefit plans. It creates no "conflicting directives" for ERISA plan administrators or otherwise interferes with the establishment or maintenance of a uniform federal ERISA regulatory scheme. No ERISA policy would be advanced and no congressional concern alleviated by preemption of the Kansas statute. To the contrary, the position advocated by Petitioner runs squarely counter to express congressional intent to exempt state workers compensation laws from ERISA preemption.

The preemptive sweep of ERISA, although broad, is not unlimited. As explained in *Combined Mgt. v. Superintendent of Bur. of Ins.*, 22 F.3d 1 (1st Cir. 1994): "Congress explicitly exempted state workers' compensation schemes from ERISA's purview, . . . leaving intact the states' traditional regulation and oversight of this specialized system of insurance." *Id.* at 4. *See also Hook v. Morrison Milling Co.*, 38 F.3d 776, 786 (5th Cir. 1994) (" '[A] preemption provision designed to prevent state interference with

federal control of ERISA plans does not require the creation of a fully insulated legal world that excludes these plans from regulation of any purely local transaction. . . .' ERISA was not meant to consume everything in its path."). Moreover, this Court has consistently held that "[p]reemption does not occur . . . if the state law has only a 'tenuous, remote, or peripheral' connection with covered plans." *Greater Washington Board of Trade*, 506 U.S. ___, 113 S. Ct. at 583 n.1.

Petitioner argues the Kansas Supreme Court's decision is inconsistent with *Greater Washington Board of Trade*, and, consequently, preemption of the Kansas statute is required. Petitioner's argument, however, does not account for the significant distinction between the District of Columbia law considered in *Greater Washington Board of Trade* and the KWCA provision at issue here. It does not reflect this Court's working " 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Blue Cross*, 514 U.S. ___, 115 S. Ct. at 1676 (citation omitted).

The District of Columbia law preempted by *Greater Washington Board of Trade* required employers who furnished health insurance coverage for employees to continue to furnish equivalent insurance to injured employees receiving workers compensation benefits. Specifically, it stated:

> Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to

> receive workers' compensation benefits under this chapter.

D.C. Code Ann. § 36-307(a-1)(1) (1992). As noted by the Kansas Supreme Court, the practical effect of the District of Columbia law was to prevent an employer from discontinuing ERISA-covered health insurance coverage for employees receiving workers compensation benefits once an ERISA plan had been established. (Petitioner's App., A11). The KWCA imposes no such mandate. The Kansas law merely looks to the value of ERISA benefits, if discontinued, as one factor to be included in the definition of "wages" used to compute workers compensation benefit levels. As a result, there is a significant factual distinction in the degree of relationship or connection between ERISA plans and the Kansas and District of Columbia laws.

The difference can be illustrated by comparing employer mandates under the two statutory provisions. Under the District of Columbia law, an employer who established an ERISA-covered health insurance plan was not free to terminate it and provide no equivalent health insurance coverage. Under the same circumstances, a Kansas employer is free to terminate an ERISA-covered health plan and has no obligation to provide an equivalent plan or coverage.

As explained by the Kansas Supreme Court:

> [T]he District of Columbia law did more than merely attach a dollar value to a fringe benefit and include a percentage of that value in computing workers compensation benefits. The District of Columbia law essentially mandated the continuation of ERISA-covered benefit plans.

(A11). Contrary to Petitioner's claim, the Kansas statute is fundamentally different from that considered in *Greater Washington Board of Trade*. As a result, neither *Greater Washington Board of Trade* nor any other decision of this Court requires a finding of preemption in this case.

B. THE KANSAS SUPREME COURT'S CONCLUSION THAT MERE GENERIC MENTION OF AN ERISA PLAN OR BENEFITS IN A STATE STATUTE DOES NOT REQUIRE PREEMPTION IS FULLY SUPPORTED BY DECISIONS OF THIS COURT, INCLUDING *GREATER WASHINGTON BOARD OF TRADE* AND *BLUE CROSS*.

Both the Kansas Supreme Court and Petitioner observe that the Kansas approach is not unique in state workers compensation systems but rather is shared by a number of states. (A6; Petition for Cert., p. 14). Quoting statutes from Missouri and Montana, Petitioner also points out that other states stand in "stark contrast" to Kansas and have expressly excluded fringe benefits furnished by employers:

> *See, e.g.*, Mo. Rev. Stat. Section 287.250.2 (1993 Cum. Supp.) (term "wages" does not include fringe benefits such as retirement, pension, health and welfare, life insurance or "other employee or dependent benefit plan furnished by the employer for the benefit of the employee").

(Petition for Cert., p. 15). Similarly, the Montana statute provides that "wages do not include . . . (d) contributions made by the employer to a group insurance or pension plan." Mont. Code Ann. § 39-71-123(2) (1993). That states

have chosen to structure their workers compensation systems in differing ways, however, lends no comfort to Petitioner's preemption claim. Rather, such differences were expressly contemplated by Congress when enacting ERISA's exemption and preemption provisions. ERISA preemption was intended to ensure that ERISA plans would be governed by a uniform body of ERISA law and regulation; it was not intended to create a national system of uniform state workers compensation systems.

Plaintiff urges this Court to conclude that the mere generic reference to fringe benefits provided under a plan that is subject to ERISA coverage dictates preemption without consideration of either the actual effect, if any, of the state law on ERISA-covered plans, or the underlying federal policies sought to be effectuated by ERISA preemption. The obvious error of this argument is demonstrated by the very language of the Missouri and Montana statutes quoted favorably by Petitioner as examples of state laws that do not run afoul of ERISA preemption. Petitioner ignores that the two state statutes, like the Kansas law, refer generically to benefits provided under employee benefit plans covered by ERISA.

On its face Petitioner's "mere mention" theory produces an incongruous result, frustrating state efforts to shape workers compensation laws in ways that are not violative of ERISA and consigning ERISA benefits to a statutory black hole. Under the "mere mention" theory of preemption, if a state statute were specifically to include the value of discontinued ERISA benefits in the wage base used to compute workers compensation benefits, the

statute would be preempted. Conversely, if the state statute were specifically to exclude the value of such discontinued benefits from the wage base, it would be similarly preempted.

Petitioner's argument simply lacks logic or wisdom. Certainly, it flies in the face of common sense to conclude that Congress, which excluded workers compensation plans and statutes from ERISA preemption, intended to leave states incapable of addressing how employee benefits should be treated in their state workers compensation laws. Obviously, something more than the mere mention of an ERISA plan or plan benefits in a workers compensation statute is necessary to invoke preemption. The statute must have some tangible legal or administrative impact, albeit direct or indirect, on an ERISA plan. And, as explained in *Greater Washington Board of Trade* and other preemption cases decided by this Court, the impact must be more than "tenuous, remote or peripheral." *Greater Washington Board of Trade*, 506 U.S. ___, 113 S. Ct. 580, 583 n.1.

Relying on this Court's holdings in *Greater Washington Board of Trade* and *Blue Cross*, the Kansas Supreme Court properly reasoned that it must " 'go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.' " (A17, quoting *Blue Cross*, 514 U.S. ___, 115 S. Ct. at 1677). Based upon this Court's articulation of congressional purpose in *Blue Cross* and an extensive review of federal appellate decisions post-dating *Greater Washington Board of Trade*, the Kansas Supreme Court concluded: (a) the mere listing of

ERISA benefits "as one factor to be included in a broader calculation is 'in and of itself' inconsequential for § 514(a) purposes" and (b) "ERISA preemption does not arise merely because of a state law that increases a company's cost of doing business in a way that could be alleviated by ERISA preemption." (A15) (citations omitted).

Support for the Kansas Supreme Court's decision may also be found in the distinction between state laws that affect ERISA plans and those, like the Kansas statute, that focus instead on ERISA benefits. The significance of this distinction is explained in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987):

> It is thus clear that ERISA's preemptive provision was prompted by recognition that employers establishing and maintaining employee benefits plans are faced with the task of coordinating complex administrative activities. . . . Preemption insures that the administrative practices of a benefit plan will be governed by only a single set of regulations. . . . It is for that reason the Congress preempted state laws relating to plans, rather than simply to benefits.

Id. at 11.

Clearly, as determined by the Kansas Supreme Court, the purposes of ERISA preemption are not in any way thwarted or undermined by the KWCA. The KWCA imposes no burden on the interests of employees or their beneficiaries under ERISA-covered plans. Similarly, it imposes no substantive requirements or administrative burdens on ERISA plans or their administrators, nor does it in any way affect the uniformity of federal ERISA law.

C. THE KANSAS SUPREME COURT CORRECTLY INTERPRETED AND APPLIED *BLUE CROSS* IN CONCLUDING PREEMPTION IS NOT REQUIRED WHERE THE KANSAS STATUTE IMPOSES NO LEGAL, STRUCTURAL CONTRIBUTION OR BENEFIT REQUIREMENTS ON ERISA PLANS AND WHERE ITS ONLY RELATIONSHIP WITH ERISA PLANS IS ECONOMIC.

In its opinion, the Kansas Supreme Court points out that Petitioner has alleged no direct administrative connection between the KWCA and any ERISA-covered employee benefit plan and that the only asserted link is economic, in that an increase in employer-paid ERISA fringe benefits may result in an increase in potential liability under the KWCA. (A7). As previously noted, however, the converse relationship does not exist. The KWCA imposes no contribution or benefit obligations on an ERISA-covered plan or plan administrators. An increase in workers compensation benefits under the KWCA requires no change at all in ERISA plan terms or benefits.

Unlike the New Jersey workers compensation law that prevented ERISA plans from setting off workers compensation benefits against ERISA-covered retirement benefits or pensions; the New York "Human Rights Law" that prohibited employers from structuring employee benefit plans in a manner that discriminated on the basis of pregnancy; or the Pennsylvania law that prohibited "plans from . . . requiring reimbursement [from the beneficiary] in the event of recovery from a third party" – all of which were considered by this Court and held to be preempted in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S.

504 (1981), *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983) and *FMC Corporation v. Holliday*, 498 U.S. 52 (1990) – the KWCA imposes no requirements relating to employee benefit levels, structures or administration. Although the KWCA may affect an employer's overall cost of doing business, it imposes no costs or other obligations on an ERISA plan itself.

Acknowledging a state law "might produce such acute, albeit indirect, economic effects . . . as to force an ERISA plan to adopt a certain scheme of substantive coverage" (115 S. Ct. 1683) – a condition clearly not present in this case – this Court specifically concluded in *Blue Cross* "that a law operating as an indirect source of merely economic influence on administrative decisions . . . should not suffice to trigger preemption. . . . " *Blue Cross*, 514 U. S. ___, 115 S. Ct. at 1680. Accordingly, the KWCA provision challenged by Petitioner is not subject to ERISA preemption on the basis of the indirect economic influence the KWCA may have on ERISA benefit plans.

D. THE KWCA TREATS ERISA BENEFITS NEUTRALLY IN CALCULATING WORKERS COMPENSATION BENEFIT LEVELS AND, CONTRARY TO PETITIONER'S ASSERTION, NEITHER FAVORS NOR DISFAVORS EMPLOYERS WHO PROVIDE ERISA BENEFIT PLANS

The KWCA does not distinguish between remuneration paid in money and the value of discontinued fringe benefits in the definition of "wages" used to calculate workers compensation benefits. The neutral treatment afforded discontinued fringe benefits and cash wages

under the KWCA was illustrated in the Kansas Supreme Court's opinion:

> If an employee has been paid a weekly cash wage of $100, but receives no other benefits, the employee's "wage" for the purpose of determining workers compensation payment levels under the KWCA is $100. Similarly, under the KWCA, if an employee has received weekly compensation of $100 composed of $80 cash and discontinued ERISA benefits having a value of $20, the employee's "wage" is again $100. LPC [Petitioner], however, urges that the $20 compensation attributable to discontinued ERISA benefits be ignored.

(A11). The illogic of Petitioner's argument is best illustrated if its application is taken to the logical end. Assume an employee's wages were composed entirely of employer paid accident, health, life insurance and employer contributions to pension and profit sharing plans and that the value of such benefits was $100. The employee receives no cash wages. If the employee were injured and the enumerated fringe benefits were discontinued, the employee would receive no workers compensation benefits at all under the scenario advanced by Petitioner. The effect would be two-fold: (1) ERISA benefits would be afforded special treatment *vis-a-vis* other forms of compensation and (2) injured workers would be deprived of workers compensation benefits based upon their full preinjury level of compensation.

Neither result is dictated by ERISA. Relying on this Court's decision in *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825 (1988), the Third Circuit specifically

counseled against the special treatment of ERISA benefits sought by Petitioner:

> We do not believe ERISA requires a state to ignore the existence of ERISA benefits when considering overall remuneration to workers. . . . Indeed, *Mackey* suggests that a law would be preempted if it counted all remuneration to workers except benefits from ERISA plans, for this would be special treatment.

Keystone Chapter, Assoc. Builders v. Foley, 37 F.3d 945 (3rd Cir. 1994), *cert. denied*, 115 S. Ct. 1393 (1995).

E. PETITIONER FAILS TO IDENTIFY ANY CONFLICT OR CONFUSION IN LOWER FEDERAL COURTS OR STATE COURTS REGARDING ERISA PREEMPTION OF STATE WORKERS COMPENSATION SCHEMES.

Petitioner asserts "there is considerable uncertainty and disagreement in the lower federal and state courts regarding the scope of ERISA preemption with respect to workers compensation schemes in general." (Pet. for Cert., p. 15). In support of this proposition, Petitioner cites no state court opinions and four federal court of appeals decisions – none of which relate to state workers compensation laws and all of which are consistent with this Court's holdings in *Greater Washington Board of Trade* and *Blue Cross*, and with the decision of the Kansas Supreme Court in this case. In three of the four court of appeals' decisions, the courts determined that the state laws at issue were not preempted.

Keystone Chapter, 37 F.3d 945 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1393 (1995), addressed the Pennsylvania

Prevailing Wage Act and found that it was not preempted even though some of the benefits counted in the prevailing wage calculation could include ERISA plan benefits. The *Keystone* court acknowledged that the Pennsylvania law would impose additional costs of that state's public works contractors, and like any other cost imposed on any employer, might "influence its choices regarding ERISA benefits contributions." 37 F.3d at 959. The court pointed out, however, that this impact "may be said of any wage regulation." *Id.* Noting that wage laws fall traditionally within the sphere of the state's police power, *Keystone* explains:

> ERISA's preemption clause aims "to ensure benefit plans will be governed by only a single set of regulations," not to bestow on employers a uniform regulatory and economic environment for all their activities across the country. Because states enact their own wage and non-ERISA benefits regulations . . . employers must adjust their operations according to locale. This administrative and financial burden arises from the "patchwork scheme" of our federal system, a system whose "separate sphere of governmental authority" were not preempted by ERISA.

Id. at 960 (citations omitted).

Minnesota Chapter of Assoc. Builders v. Dept. of Labor, 47 F.3d 975 (8th Cir. 1995), similarly concluded that the Minnesota prevailing wage law was not preempted by ERISA. The Eighth Circuit identified a number of factors to be considered in determining whether a state law is preempted because it "relates to" ERISA plans. They include whether the law:

> (1) negates an ERISA plan provision; (2) affects relations between primary ERISA entities; (3) changes the structure of ERISA plans; (4) affects ERISA plan administration; (5) affects ERISA plans economically; (6) exercises traditional state power; and (7) may be preempted consistent with other ERISA provisions.

Id. at 978. Like the Kansas Supreme Court and in accord with *Keystone*, the Eighth Circuit explained: "These factors must be assessed in light of the totality of the state statute's impact on the plan." *Id.*

Finally, *Guidry v. Sheet Metal Workers National Pension Fund*, 39 F.3d 1078 (10th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1691 (1995), determined that ERISA did not preempt a Colorado statute which exempted from garnishment 75% of disposable earnings, including compensation denominated as "avails of any pension or retirement benefits, or deferred compensation plan, avails of health, accident or disability insurance, or otherwise." *Id.* at 1085 (citation omitted). The Tenth Circuit acknowledged the Colorado law made generic reference to benefits attributable to ERISA-covered plans, but pointed out that, unlike the Georgia law considered in *Mackey* and found to be preempted, it made no specific reference to ERISA benefits or ERISA plans.

Simas v. Quaker Fabric Corporation of Fall River, 6 F.3d 849 (1st Cir. 1993) is the only federal courts of appeals case cited by Petitioner where a state statute was determined to be preempted by ERISA. It is readily apparent that *Simas* in no way conflicts with *Keystone, Minnesota, Guidry* or the state court decision in this case. *Simas* involved a Massachusetts state "tin parachute" law that

required employers to made substantial severance payments to employees who lost their jobs following corporate takeovers. The court found the directive to pay prescribed severance benefits constituted an employee benefit plan covered by ERISA.[1] Not surprisingly, *Simas* concluded a state statute cannot mandate benefits if they comprise an "employee benefit plan, no matter how virtuous the statute." *Id.* at 856. Because the Massachusetts law imposed such a plan, it was preempted.

In short, *Simas* reached a preemption conclusion different from the other decisions cited by Petitioner because it dealt with a state-imposed severance plan and because it considered a statutory scheme that differed materially from the state laws at issue in those cases. Certainly, there can be no plausible suggestion that the method of calculating workers compensation benefits under the KWCA constitutes establishment of an ERISA employee benefit plan so as to fall within the preemptive analysis of *Simas*.

Petitioner's assertions of "confusion and difficulty" in the lower federal courts and state courts in ascertaining the scope of ERISA preemption in workers compensation matters do not withstand scrutiny. Any confusion attendant to the issue is that of Petitioner and not of the

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[1] This is not a novel or startling finding, nor does it reflect conflict and confusion among lower federal courts, since courts have generally recognized that severance pay plans are employee benefit plans squarely falling within the provisions of ERISA. *See, e.g., Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986); *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2nd Cir. 1985), *aff'd*, 477 U.S. 901 (1986).

courts. Respondents respectfully suggest that Petitioner's reliance on alleged judicial confusion as a basis for its Petition for Writ of Certiorari is misplaced.

CONCLUSION

For the foregoing reasons, Respondents submit Petitioner's request for summary reversal is wholly unwarranted and pray that the Petition for Writ of Certiorari be denied in all respects.

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